IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAKE MCCAULEY,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 01-4071
THOMAS E. WHITE, SECRETARY OF THE ARMY,	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. MAY 21, 2002

Plaintiff, Jake McCauley, ("Plaintiff") filed this civil action premised upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e- 2(a)(1) ("Title VII"), on August 10, 2001 against the Department of the United States Army. Plaintiff avers that he was subjected to a hostile work environment as a result of religious and sex discrimination and retaliation by his supervisor while employed by the Army Corps of Engineers. Presently before the Court is the motion of Defendant Thomas E. White for summary judgment on all of Plaintiff's claims. For the following reasons, Defendant's motion is granted and summary judgment will be entered in favor of Defendant on Plaintiff's claims for sexual discrimination and religious discrimination, but the motion is denied as to Plaintiff's claim for retaliation as issues of material fact remain.

I. Background

Plaintiff was employed as Chief Mate on the Dredge McFarland which is a sea-going hopper dredge in the service of the Army Corps of Engineers. The Dredge McFarland

employees serve a rotating tour of duty which consists of sixteen days aboard the McFarland with twelve days off. Plaintiff, a nondenominational Christian male, alleges that he was subjected to a hostile work environment from March 23, 2000 through the present as a result of religious and sex discrimination by his superior, Captain A. Karl Van Florke ("Van Florke"), a Catholic male, who was assigned as Master of the McFarland. Plaintiff alleges that Van Florke then retaliated against him for filing a complaint with the Equal Employment Office ("EEO") by increasing the discriminatory treatment against him and by preventing Plaintiff from acting as Relief Master in the absence of Van Florke and the Assistant Master. Plaintiff alleges the following facts in support of his sexual harassment claim.

Plaintiff was on duty as Chief Mate on the Dredge McFarland on March 23, 2000, when he was relieved by Van Florke so that Plaintiff could take a break. (Pl.'s Compl., ¶ 17). Plaintiff retired to his quarters and was approached by a crew member who was requesting leave because of crab lice. (Id. ¶ 18). Plaintiff then approached Van Florke in order to ask for guidance on the course of action to take since crab lice is a major problem on board a ship where men are in close quarters. (Id. ¶¶ 18-19). When Plaintiff requested guidance, Van Florke grabbed Plaintiff's arm and began forcing it toward Van Florke's groin area, saying "Is it itching right here, Jake, is it itching right here?" (Id. ¶ 20). Plaintiff objected to Van Florke's conduct and Van Florke eventually let go. (Id. ¶ 21). Plaintiff asserts that he was offended by VanFlorke's actions and that this incident alone created a sexually hostile environment.

Plaintiff also alleges that Van Florke picked on him because of his religious

devotion and cites to several incidents in support of his religious discrimination claim.[1] Plaintiff is a nondenominational Christian who considers himself a devoted Christian who makes his beliefs known, wears clothing with Christian themes and discusses Christian topics with persons receptive to such conversations. (Id. at 15). On April 28, 1999 and May 18, 1999 Plaintiff contends that Van Florke, in response to Plaintiff's wearing a Star of David, approached Plaintiff and informed him of his first name which was Adolf.[2] On February 28, 2000, VanFlorke asked Plaintiff if he was "queer or something" for not wanting to look at a photo of a co-worker and woman in a bar. (Id. at 16). On the same day, Van Florke told Plaintiff that he should go work for a Christian company in response to Plaintiff saying that had used to work on a tug boat and that it was a good job. (Id.). Also on that date, Plaintiff claims that Van Florke asked him if Adam and Eve had a navel. The following day, February 29, 2000, when Plaintiff did not want to go to a lingerie show with several co-workers, Van Florke told Plaintiff that he would "bless the wine." (Id.). On March 1, 2000, Van Florke stated "maybe G-D was already there with the man before the police arrived" in response to viewing a news report regarding a hostage situation. Lastly, on an undated occasion, Van Florke asked Plaintiff if Jesus should have been a saint.

Plaintiff contacted the EEO Office on March 23, 2000 and filed a Complaint on April 26, 2000 alleging that he was subjected to a hostile work environment on March 23, 2000.

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[1] Plaintiff also includes the March 23, 2000 incident in support of his religious discrimination claim, however, this Court does not include the incident as it has no relation to Plaintiff's religion.

[2] Although Plaintiff is not Jewish, Plaintiff alleges that "he holds strong religious beliefs that he identifies as non-denominational Christian, and strongly and vocally advocates for the Jewish people and their religion". (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J., 5).

Plaintiff also included additional claims for religious discrimination and retaliation in his April 26, 2000 EEO Complaint. A fact-finding hearing was held on July 25, 2000, and an EEO investigation pursued from July 25, 2000 until August 22, 2000. A final decision was rendered on this matter on May 14, 2001.

Plaintiff filed the present Complaint alleging that he was subjected to a hostile work environment as a result of religious and sex discrimination and retaliation by Van Florke, his supervisor, while employed by the Army Corps of Engineers. Defendant filed the present motion requesting this Court to grant summary judgment on all counts of Plaintiff's Complaint.

II. Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The court is to determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). In making this determination, a court must draw all reasonable inferences in favor of the non-movant. Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 n. 2 (3d Cir.1983). A non-movant may not, however, "rest upon mere allegations, general denials, or ... vague statements." Quiroga v. Hasbro, Inc., 934 F.2d 497, 500 (3d Cir. 1991). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 242. Summary judgment must be granted if no reasonable trier of fact could find for the non-moving party. Id. "[T]he plain language of Rule 56(c)

mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "When the record is such that it would not support a rational finding that an essential element of the non-moving party's claim or defense exists, summary judgment must be entered for the moving party." Turner v. Schering- Plough Corp., 901 F.2d 335, 341 (3d Cir. 1990).

III. Discussion

A. Plaintiff Cannot Make Out a Prima Facie Case for Sexual Harassment Hostile Work Environment

To make out a prima facie case for a sexually hostile work environment under Title VII, a plaintiff must demonstrate five elements: "(1) the employee[ ] suffered intentional discrimination because of his sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability." Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999) (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)). The bottom line in a sexual harassment case, however, is that the plaintiff must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discriminat[ion] . . . because of . . . sex." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (internal citations omitted). The Supreme Court has enumerated some of the factors that courts should consider in determining whether alleged conduct is sufficiently serious

to support a hostile work environment claim, including: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). The conduct must be both objectively and subjectively abusive. See Harris 510 U.S. at 21-22 (1993). Furthermore, courts must not view individual incidents in a vacuum, but must instead consider the "totality of the circumstances." See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996). In the present case, it is clear that Plaintiff cannot meet his burden of showing a hostile work environment as he has failed to prove that he was discriminated against because of his sex, that the conduct was severe or regular and that the discrimination would detrimentally affect a reasonable person of the same sex in his position.

1. Intentional Gender Discrimination

Plaintiff's Title VII sexual harassment claim hinges on the one incident which took place on March 23, 2000. To make out a case under Title VII, it is "necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff 'had been a [woman] [he] would not have been treated in the same manner.' " Andrews, 895 F.2d at 1485 (citations omitted). While Van Florke's actions may be categorized as unprofessional and inappropriate, this conduct does not amount to sexual discrimination on the basis of Plaintiff being a male. It is well settled that "verbal and physical harassment, no matter how unpleasant and ill-willed, is simply not prohibited by Title VII if not motivated by the plaintiff's gender." Oncale, 523 U.S. at 80. Since there is simply no evidence that the incident occurred because of Plaintiff's gender, Plaintiff has failed to satisfy this prong.

2. Pervasive and Regular

The Third Circuit has defined "pervasive harassment" as "that which occurs regularly or when incidents are in concert with one another." Andrews, 895 F.2d at 1484. A single incident may be actionable if extremely serious, however, "th[e] standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code." Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998)(quoting Oncale, 523 U.S. at 80)). After considering the totality of the circumstances surrounding the March 23, 2000 incident which gave rise to the present action, the isolated incident does not meet the required "pervasive and regular" standard as required to create a hostile environment under Title VII. See e.g. Saxton v. AT&T, 10 F3d 526 (7th Cir. 1993)(finding that supervisor's conduct, while inappropriate, was not so severe or pervasive to create a hostile work environment where supervisor rubbed plaintiff's leg, kissed her, and after rejection, refused to speak with her and teased her about her relationship with a co-worker and was impatient and condescending); Morgan v. Mass. Gen. Hosp., 901 F.2d 186 (1st. Cir. 1990)(finding that conduct is not severe or pervasive where a gay co-worker engaged in a bumping incident, peeped at a complainants "privates" in the men's restroom, hung around him a lot, and asked him to dance at a Christmas party); but see Smith v. Sheahan, 189 F.3d 529 (7th Cir. 1999)(finding a hostile environment where plaintiff, a county jail guard, alleged that co-worker threatened harm and twisted her wrist severely enough to damage ligaments, draw blood, and eventually require corrective surgery in addition to alleged repeated verbal abuse and threats of physical harm). Accordingly, Plaintiff has failed to satisfy this prong.

3. Subjective Effect of Discrimination on Plaintiff

Plaintiff has established that he has subjectively suffered an injury.[3] "The subjective factor is crucial because it demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief." Andrews, 895 F.2d at 1483. Plaintiff requested leave from his employment and took off several sixteen-day tours as a result of the hostile environment. Plaintiff has also discussed his mental injuries with his psychologist/psychiatrist who he had been seeing for approximately a year and a half prior to the March 23, 2000 incident.

4. Objective Effect of Discrimination on Plaintiff

This is a critical prong which protects the employer from the "hypersensitive" employee as it asks whether the discrimination would detrimentally affect a reasonable person of the same sex in Plaintiff's position. Therefore, the Court must determine whether the March 23, 2000 would have created a hostile or abusive working environment to a reasonable male Chief Mate. Plaintiff admits that he has a "sensitivity to overt sexuality." (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J., 1). Further, Plaintiff's hypersensitivity is quite apparent in a letter he wrote recounting sexually traumatic events from his past which caused him to suffer many years of mental anguish. Plaintiff finally sought psychiatric help to deal with those events. (Def. Mot. for Summ. J., Ex. 17). As stated previously, Van Florke's conduct was unprofessional, however, a reasonable male in Plaintiff's position would not have suffered the effects as felt by Plaintiff so

[3] Plaintiff's Response to Defendant's Motion for Summary Judgment is devoid of any analysis with regards to this prong. However, out of an abundance of caution, this Court reviewed the transcript from the EEO fact-finding conference on July 25, 2000 regarding the March 23, 2000 incident which was filed as Exhibit 10 to Defendant's Motion for Summary Judgment. The Court has included those facts from Plaintiff's testimony relevant to satisfy this prong.

as to alter the environment of his workplace.[4] Accordingly, Plaintiff has failed to meet this prong.

Plaintiff has failed to meet three of the five prongs in order to sustain his claim of sexual harassment. In the interest of judicial economy, and since neither party briefed the issue, this Court will not examine the fifth prong which examines the existence of respondeat superior liability. Therefore, Plaintiff has failed to produce sufficient evidence such that a reasonable jury could return a verdict in his favor on his hostile environment claim.

B. Plaintiff Cannot Make a Prima Facie Showing of Religious Discrimination.

Plaintiff also avers that he was subjected to a hostile work environment as a result of religious discrimination. To make out a prima facie case for a religiously hostile work environment under Title VII, a plaintiff must demonstrate five elements: "(1) the employee[ ] suffered intentional discrimination because of [religion]; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same [religion] in that position; and (5) the existence of respondeat superior liability." Abramson v. William Paterson College of New Jersey, 260 F.3d 265, 267-8 (3d Cir. 2001)(internal citations omitted).

In support of his claim for religious discrimination, Plaintiff cites to the following events. On April 28, 1999 and May 18, 1999 Van Florke approached Plaintiff and informed him of his first name which was Adolf. Plaintiff argues that, although he is not Jewish, that "he holds strong religious beliefs that he identifies as non-denominational Christian, and strongly and

[4] Plaintiff incorrectly applies the standard of "a reasonable, religious heterosexual male". (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J., 10).

vocally advocates for the Jewish people and their religion." (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J., 5). On February 28, 2000, VanFlorke asked Plaintiff if he was "queer or something" for not wanting to look at a photo of a co-worker and woman in a bar. On the same day, Van Florke told Plaintiff that he should go work for a Christian company in response to Plaintiff saying that had used to work on a tug boat and that it was a good job. Also on that date, Plaintiff claims that Van Florke asked him if Adam and Eve had a navel. The following day, February 29, 2000, when Plaintiff did not want to go to a lingerie show with several co-workers, Van Florke told Plaintiff that he would "bless the wine." On March 1, 2000, Van Florke stated "maybe G-D was already there with the man before the police arrived" in response to viewing a news report regarding a hostage situation. Lastly, on an undated occasion, Van Florke asked Plaintiff if Jesus should have been a saint.

1. Intentional Religious Discrimination

This prong requires evidence to show that VanFlorke's conduct was intentionally directed at the Plaintiff because of his religion. Abramson, 260 F.3d at 278. After applying this standard to the events enumerated above, the following comments fail to satisfy this prong as they were not directed at Plaintiff because of his religion: (1) the February 28, 2000 photo incident where Plaintiff did not want to look at a picture of a co-worker and a woman in a bar; and (2) the March 1, 2000 incident when Van Florke stated "maybe G-D was already there with the man before the police arrived" in response to viewing a news report on a hostage situation. The remaining comments listed above satisfy this prong as they were directed at Plaintiff because

his religion.[5]

2. Pervasive and Regular

As stated previously, when determining whether the alleged discriminatory practices are pervasive and regular to create a hostile work environment, it is necessary to consider the totality of the circumstances. The alleged discriminatory acts in the case *sub judice* do not satisfy this prong. The two 1999 "Adolf" events took place almost a year apart from the remaining three events which took place over a three day span in February. In order for the conduct to be categorized as pervasive and regular, the incidents must occur in concert or on a regular basis. The several comments which were stated over a three-day span do not meet the standard necessary in order to create a hostile work environment under Title VII. Accordingly, Plaintiff has failed to satisfy this prong.

3. Subjective Effect of Discrimination on Plaintiff

Plaintiff has established that he has subjectively suffered an injury.[6] "The subjective factor is crucial because it demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief." Andrews, 895 F.2d at 1483. Plaintiff requested leave and has taken off several sixteen day tours as a result of the alleged discrimination. Plaintiff has also discussed his mental injuries with his psychologist/psychiatrist who he had been

[5] While Plaintiff is not Jewish, the Court must "look in the light most favorable to the non-movant", so we will include the April 28, 1999 and May 18, 1999, "Adolf" statements as satisfying this prong.

[6] Plaintiff's Response to Defendant's Motion for Summary Judgment is devoid of any analysis with regards to this prong. However, out of an abundance of caution, this Court reviewed the transcript from the EEOC hearing for the March 23, 2000 incident which was filed as Exhibit 10 to Defendant's Motion for Summary Judgment. The Court has included those facts from Plaintiff's testimony relevant to satisfy this prong.

seeing for approximately a year and a half prior to the March 23, 2000 incident. Therefore, Plaintiff has satisfied this prong.

4. Objective Effect of Discrimination on Plaintiff

In determining whether the fourth prong is met, the Court must take into account all of the circumstances, including: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S at 23. The Supreme Court has warned that discriminatory changes in the terms and conditions of employment will not be found where the complained conduct consists of "simple teasing, offhand comments, and isolated events." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) Nor will Title VII be violated by the "mere utterance of an . . . epithet which engenders offensive feelings" or by mere "discourtesy or rudeness". Id. at 787. Plaintiff has failed to meet this prong as a reasonable non-denominational Christian person would not have experienced altered working conditions as a result of Van Florke's conduct. Although Plaintiff was offended by VanFlorke's "ridiculous" questions about Plaintiff's religion and felt that VanFlorke "mocked his religious beliefs", this conduct does not amount to a hostile environment created by religious discrimination. Therefore, Plaintiff has failed to satisfy this prong.

Plaintiff has failed to meet three of the five prongs in order to sustain his claim of religious discrimination. In the interest of judicial economy, and since neither party briefed the issue, this Court will not examine the fifth prong which examines the whether Defendant is liable under respondeat superior. Therefore, Plaintiff has failed to produce sufficient evidence such

that a reasonable jury could return a verdict in his favor on his religious discrimination claim .

IV. Conclusion

For all the foregoing reasons, Plaintiff has failed to make out a prima facie case in support of his religious and sex discrimination claims as no reasonable jury could find in his favor. Therefore, summary judgment is granted in favor of Defendant on Count I of Plaintiff's Complaint for sex and religious discrimination. Summary judgment is denied as to Count II of Plaintiff's Complaint for retaliation as questions of material fact still remain.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAKE MCCAULEY,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 01-4071
THOMAS E. WHITE, SECRETARY OF THE ARMY,	:	
Defendant.	:	

ORDER

AND NOW, this 21st day of May, 2002, upon consideration of Defendant's Motion for Summary Judgment (Dkt. No. 7), and any Responses and Replies thereto, it is hereby **ORDERED** that the Motion is **GRANTED** in part and **DENIED** in part. It is hereby further **ORDERED** that:

1. Summary Judgment is **GRANTED** in favor of the Defendant on Plaintiff's claims of sex discrimination. Therefore, that claim is **DISMISSED** with prejudice;

2. Summary Judgment is **GRANTED** on Plaintiff's claims of religious discrimination. Therefore, that claim is **DISMISSED** with prejudice; and

3. Summary Judgment is **DENIED** on Plaintiff's claim of Retaliation.

BY THE COURT:

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ROBERT F. KELLY, Sr. J.